No. 97-1943

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, ET AL.,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether fully correctable nearsightedness is a "disability" under the Americans with Disabilities Act.

2. Whether a global air carrier's decision to require pilot applicants to have 20/100 or better uncorrected vision automatically subjects it to litigation over whether it "regard[s] as" disabled persons who do not meet its vision standards.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Karen Sutton and Kimberly Hinton were plaintiffs in the district court and appellants in the court of appeals. Respondent United Air Lines, Inc., was defendant in the district court and appellee in the court of appeals. There were no other parties below.

The parent of United Air Lines, Inc., is UAL Corporation. United Air Lines, Inc., has no subsidiaries that are not wholly owned.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 45-74) is reported at 130 F.3d 893. The opinion of the district court (J.A. 30-44) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 75) was entered on November 26, 1997. A petition for rehearing was denied on March 3, 1998. J.A. 76-77. The petition for a writ of certiorari was filed on June 1, 1998, and granted on January 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case requires the Court to decide whether more than 100 million Americans who have nearsightedness that is correctable by ordinary glasses or contact lenses are covered by the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Petitioners Karen Sutton and Kimberly Hinton sued respondent United Air Lines, Inc., under the ADA after United refused to consider their applications for employment as pilots because their vision failed to meet United's standards for visual acuity. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. J.A. 30-44. The court of appeals affirmed. J.A. 45-74.

1. The complaint alleged that petitioners, who are identical twins, are experienced airline pilots working for regional air carriers. J.A. 19. Petitioners alleged that it was their "life long goal to fly for a major air carrier." J.A. 17. According to the complaint, in 1992 both petitioners submitted applications and were interviewed for pilot positions at United, but were rejected because their uncorrected vision failed to meet United's minimum standards for pilots. J.A. 20-23. The complaint alleged that United requires pilots to have uncorrected distance vision of 20/100, a standard that "was modeled on military requirements for pilot training." J.A. 25. Petitioners contended that "United's policy blocks [them] from an entire class of employment: global airline pilot" (*ibid.*), and that "other global carriers had similar or higher minimum standards, thus blocking [petitioners] from seeking the same class of employment elsewhere in the industry." J.A. 26.

According to the complaint, petitioners each have uncorrected vision of 20/200 or worse in one eye and 20/400 or worse in the other, but have 20/20 vision when using corrective lenses. J.A. 23. Petitioners alleged that without their glasses they "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television, or shopping in public places." J.A. 24. They admitted, however, that "[w]ith corrective measures" they "function identically to individuals without a similar impairment." *Ibid.*

2. The ADA forbids discrimination

> against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1996). The statute defines "disability * * * with respect to an individual" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Id. § 12102(2). Petitioners alleged that they "are substantially limited in the major life activity of seeing" and that United "regards [them] as having a substantially limiting impairment." J.A. 23, 24.

3. The district court ruled that the complaint failed to allege facts sufficient to establish that petitioners had a "disability" under either the first or the third clause of 42 U.S.C. § 12102(2). With regard to the first clause, the court ruled that petitioners were not significantly restricted in the major life activity of either seeing or working. J.A. 36-37. The court pointed out that, "with their corrective lenses, [petitioners] are able to function identically to individuals without a similar impairment" (*ibid.*), and ruled that "the need for corrective eyewear is commonplace and does not substantially limit major life activities." J.A. 37. Observing that petitioners were employed as commercial airline pilots, the court ruled that their "common moderate vision impairment, although certainly an undesirable inconvenience, does not substantially limit their ability to work within the meaning of the ADA." J.A. 40. The court explained generally that "the ADA was intended to protect

> only a limited class of persons * * * who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared." J.A. 40-41.

With regard to petitioners' claim that they were "regarded as" disabled under the third clause of 42 U.S.C. § 12102(2), the court stated that "[t]here is no support for the allegation that United, based on stereotype, myth, or unsubstantiated fears, regards [petitioners] as substantially impaired in the major life activity of seeing." J.A. 41. Stating that the test for whether United regarded petitioners as substantially limited in working "is whether the impairment, as perceived, would affect the individual's work across the spectrum of the same or similar jobs," the court observed that:

> [a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general.

J.A. 42. The court then ruled that "[a]t most, [petitioners] can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Ibid.*

4. The court of appeals affirmed. J.A. 45-74. The court ruled that petitioners' poor uncorrected vision was an "impairment" (J.A. 58) and then analyzed whether it "substantially limits one or more of the[ir] major life activities." Comparing petitioners' vision to "the vision of the average person in the general population" (J.A. 60), the court of appeals ruled that they were not substantially limited in the major life activity of seeing. While recognizing that petitioners' "uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing," the court ruled that "this is a hypothetical situation." J.A. 65. The court stated (J.A. 65-66):

> In fact, [petitioners] do not limit their normal daily activities to those that could be performed with their uncorrected vision. [Petitioners] admit that with their corrective measures they "function identically to individuals without a similar impairment." [Petitioners] merely don their eye glasses (or contact lenses) and go about all their daily activities in the same or similar condition, manner, or duration as the average person in the general population.

The court of appeals rejected petitioners' argument that EEOC interpretive guidance required the court to evaluate their vision impairment without considering the effect of their corrective lenses, ruling that the guidance "is in direct conflict with the plain language of the ADA." J.A. 64. "In making disability determinations," the court stated, "we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." *Ibid.*

The court of appeals also ruled that United did not "regard" petitioners as disabled in the major life activity of working. The court stated, "[a]n employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that the individual is incapable of performing a particular job." J.A. 68. To establish such a claim, the court explained, "an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." J.A. 70. Characterizing the complaint as claiming that United had disqualified petitioners from the job of "global airline pilot," the court ruled that "this description is too narrow to constitute a 'class of jobs.'" J.A. 71. The court observed that the provision of the ADA protecting individuals who are "regarded as" disabled "seeks to remedy perceived disabilities that, like actual disabilities, extend beyond the isolated mismatch of employer and employee." J.A. 73.

SUMMARY OF ARGUMENT

Until a recent spate of district court decisions, courts construing both the ADA and its predecessor had not regarded correctable nearsightedness as a disability. Even now, courts — and petitioners and the Government — show obvious unease at the prospect of including such a common and easily treatable condition, so far removed from the paradigms that animated the ADA, as a disability. Advocates for that position resort to abstraction and talk about the supposed implications for other disabilities if mitigating measures are used to exclude the nearsighted from the Act's coverage.

There is good reason for that discomfort and avoidance. More than 100 million Americans use glasses or contact lenses to correct their vision. Approximately one-quarter of the nation's adult population could not drive without vision correction. Corrected vision is so commonplace in American society that for almost all purposes

(other than a few jobs in which good uncorrected vision may be especially critical) vision is considered in its corrected state.

The findings of fact in the ADA show that Congress did not intend correctable nearsightedness to be considered a disability. The 43 million people the statute was supposed to cover are dwarfed by the number of people with correctable vision conditions. Nearsighted people are not a discrete and insular minority, historically segregated and isolated, characterized by societal disadvantage. The structure and provisions of the Act confirm Congress's intent. The Act protects ***only*** the disabled, not everyone, and the phrase "substantially limits * * * major life activities" was meant to narrow its scope to those with ***functional*** impairments. Petitioners and the Government try to avoid these obvious conclusions by asserting that petitioners' nearsightedness is more severe than "average," but that is a distinction without a difference because petitioners function identically to those with less severe nearsightedness who nonetheless need corrective lenses to see clearly. And the legislative history shows that, in trying to assess the impact the statute would have, Congress and its advisors made specific assumptions about which individuals with vision impairments would be covered, and considered only those who are limited by the impairment ***in its corrected state***.

The Court should require that the impairment be considered in its corrected state, particularly when the "impairment" is nearsightedness, and in fact more generally. The EEOC's contrary interpretive guidance should not be followed. Interpretive guidance does not receive the same deference as regulations. The efforts here to avoid that principle by arguing that the guidance was put out for notice and comment should fail. Even if the guidance ***generally*** was subject to notice and comment (itself a debatable proposition), the ***specific*** provision requiring a hypothetical inquiry, in which mitigating measures are disregarded, was not. It was added ***after*** the comment period at the urging of disability rights groups. In any event, the interpretive guidance is internally inconsistent, and the portion on which petitioners rely contradicts the plain meaning of the statute. The arguments that petitioners and their *amici* have offered as to why their reading makes sense are ingenious, but they rely on meanings that the words will not bear, anomalies that do not exist, and supposed absurdities that are not as absurd as the implications of petitioners' own position.

The legislative history will not do the work that the statute's text cannot. A snippet or two from committee reports supports petitioners' position (although not in the context of nearsightedness), but other snippets point strongly in the opposite direction, including some on which petitioners themselves rely. At the least, the ADA should be read to exclude persons with widely shared and easily correctable "impairments" such as petitioners' nearsightedness. If the sources bearing on the question in this case are deemed too contradictory to support a flat rule that mitigating measures are always considered — and we submit that the text of the statute, including the non-hypothetical phrase "substantially limits," overwhelms any supposed contradictory indications — then the Court should frankly acknowledge the difficulty and exclude nearsightedness from any general rule to ignore mitigating measures, as ***all*** reliable indicators of congressional intent on the precise point at issue suggest.

Petitioners have not pleaded a litigable issue under the "regarded as" prong of the definition of disability. United regards them as less than ideally suited for its passenger pilot positions, not as categorically unfit to fly airplanes. In any event, working ***as a pilot*** is not a "major life activity"; working is. Petitioners have not pleaded that United regards them as unfit to work.

ARGUMENT

Petitioners' nearsightedness constitutes a "disability" if, and only if, it is "a physical * * * impairment that substantially limits one or more of [their] major life activities" or they are "regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (C).[1] Petitioners do not allege in the literal words of the statute that their nearsightedness "substantially limits" them, but they contend that it is enough that it ***would*** so limit them if they did not wear corrective lenses. They also contend that United's use of their uncorrected vision as a criterion for limiting its pool of pilot applicants proves, *ipso facto*, that United regarded them as disabled.

[1] The contention of amicus AFL-CIO that petitioners have "a record of such an impairment" (42 U.S.C. § 12102(2)(B)) is not properly before the Court, having not been raised in the proceedings below, in the petition for certiorari, or in petitioners' brief on the merits. It is also plainly incorrect. Because the "record" must be "of such an impairment," *i.e.*, one that "substantially limits" a major life activity, subsection (B) adds nothing to the claims of persons, like petitioners, who assert that they are no more and no less impaired or limited than they ever were in the past.

Whether corrective measures are to be taken into account in answering the questions posed by the statute is a subsidiary issue that the Court may have to consider, but the overarching issue is whether these (and similar) petitioners are within the reach of the statute, not a consideration of mitigating measures in the abstract. Cf. Pet. Br. 27 (referring to "what treatments, medications, or other measures each disabled person must undergo," but avoiding reference to eyeglasses or contact lenses), 34 (referring to "medication or other means"). We therefore start in Part I with the question petitioners relegate to a short section near the end of their brief (Pet. Br. 38-40): What do the text and history of the ADA tell us about ***nearsightedness***? In Part II, we show that subsection (A) does not reach petitioners because their nearsightedness does not substantially limit their major life activities. In Part III, we show that subsection (C) does not reach petitioners because their allegations (taken as true) do not show that United regarded them as disabled.

I. CONGRESS DID NOT INTEND THE ADA TO COVER PEOPLE WITH CORRECTABLE NEARSIGHTEDNESS

Even those who support the broadest interpretation of the ADA are uneasy with the notion that people who wear glasses to correct nearsightedness are "disabled." Until recently, most courts that had considered the issue had determined that correctable nearsightedness is not a disability.[2] The ADA was modeled on the Rehabilitation

[2] See *Testerman* v. *Chrysler Corp.*, 1997 U.S. Dist LEXIS 21392 (D. Del. Dec. 30, 1997); *Cline* v. *Fort Howard Corp.*, 963 F. Supp. 1075 (E.D. Okla. 1997); *Schluter* v. *Industrial Coils, Inc.*, 928 F. Supp. 1437, 1447 (W.D. Wis. 1996); *Sweet* v. *Electronic Data Sys., Inc.*, 1996 U.S. Dist. LEXIS 5544 (S.D.N.Y. Apr. 26, 1996); *Venclauskas* v. *Connecticut*, 921 F. Supp. 78 (D. Conn. 1995); *Joyce* v. *Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996); *Trembczynski* v. *Calumet City*, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987); *Padilla* v. *City of Topeka*, 708 P.2d 543 (Kan. 1985). In the wake of appellate rulings that corrective measures must be disregarded when determining whether an individual has a disability, a number of district courts have recently treated correctable nearsightedness as disability. See *Denson* v. *Village of Bridgeview*, 19 F. Supp. 2d 829 (N.D. Ill. 1998); *Fallacaro* v. *Richardson*, 965 F. Supp. 87 (D.D.C. 1997); *Wilson* v. *Pennsylvania State Police Dep't*, 964 F. Supp. 898 (E.D. Pa. 1997); *Peacock* v. *County of Marin*, 953 F. Supp. 306 (N.D. Cal.

Act of 1973, 29 U.S.C. § 701 *et seq.*, which had been in force 17 years without any statement by a government agency or holding by a court that nearsightedness constitutes a "disability" or "handicap."[3] The EEOC itself had ruled that a vision impairment "fully corrected by wearing * * * lenses" was not a disability. *Kienast* v. *Frank*, 1990 WL 711359, *6 (EEOC Mar. 27, 1990).

Even courts holding that mitigating measures are irrelevant to the disability determination have expressed discomfort with applying that rule to nearsightedness.[4] Some have suggested an exception for nearsightedness. The court in *Arnold* v. *United Parcel Serv., Inc.*, 136 F.3d 854, 863 (1st Cir. 1998), held that impairments should be assessed without regard to mitigating measures, but noted that it "might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses," because "[t]he availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of 'minor, trivial impairment[ ],' * * * that would not be a disability under the ADA." *Id.* at 866 n.10 (quoting S. Rep. No. 101-116, at 23 (1989)); see also *Washington* v. *HCA Health Servs.*, 152 F.3d 464, 471 (5th Cir. 1998), petition for cert. pending, No. 98-1365.

1997); *Sicard* v. *Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996).

[3] In *Sharon* v. *Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986), which petitioners cite, it was "not disputed that Sharon is handicapped" (*id.* at 1401), so the court had no occasion to say what it was about Sharon's vision impairment that made him handicapped. Because even his ***corrected*** vision had "a large and dangerous blind spot resulting from the structure of the [bioptic] lenses," *id.* at 1402, the case in no way supports the proposition that persons with fully correctable vision impairments were considered handicapped in ***any*** Rehabilitation Act case or commentary. Petitioners concede that no other Rehabilitation Act authority supports considering nearsightedness as a handicap or disability. Pet. Br. 25-26 & n.28; cf. *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202, 2205, 2207-2208 (1998) (relying on Rehabilitation Act practice and regulations in construing ADA).

[4] *E.g.*, *Smith* v. *Norton Indus.*, 17 F. Supp. 2d 1094, 1099 (D.S.D. 1998) ("it would seem to be unfair * * * to conclude that uncorrected vision due to the aging process would translate into a disability within the meaning of the ADA").

The briefs of petitioners and their *amici* appear sensitive to the incongruity of petitioners' claims to disabled status, and revealingly have devoted remarkably few of their pages to discussing the facts of this case. The Government, too, has been tentative in its embrace of petitioners' position. When petitioners sought certiorari, the Government recommended that the Court not grant plenary review in this case; now that the Court has done so anyway, the Government supports petitioners but tries to reassure the Court that a decision in their favor would be confined to the severely myopic.

This discomfort with petitioners' case, we submit, is rooted in two circumstances. First, nearsightedness is a widely shared trait normally viewed as a minor inconvenience rather than a serious problem of the sort that Congress addressed in the ADA. Petitioners themselves apparently never suffered a single hardship stemming from their nearsightedness until they failed to meet United's standards for uncorrected visual acuity. Second, because pilots for global air carriers daily hold in their hands the lives of hundreds of passengers, it seems reasonable to expect them to meet standards of physical fitness that many Americans might be unable to satisfy. In short, it is surprising that petitioners might be considered "disabled" under the ADA merely because their widely shared and easily correctable visual deficiency has excluded them from one highly competitive job that understandably demands reliable eyesight.

The ADA does not entirely prohibit — or even require justification of — all employment decisions based on physical characteristics, nor does it give employees with minor impairments the right to sue employers. Instead, Congress defined a discrete group facing physical limitations significantly more serious than those experienced by the average person and provided them with special protections to further their full integration into the economy. If those protections are accorded to the more than 100 million Americans who suffer from correctable nearsightedness, then the central framework of the ADA — its protection of a discrete group of persons whose impairments are substantial — will be severely diluted.[5]

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[5] In focusing on the specific impairment at issue in this case, respondent does not question in any way the holding of the court of appeals that corrective measures always should be taken into account in determining whether an individual is "disabled" within the meaning of the ADA. We support that holding at pp. 22-42, *infra*, and we agree with the arguments being made in support of that holding by the respondent in *M. phy* v.

A. Correctable Nearsightedness Is A Common Condition That Does Not Seriously Affect The Lives Of Those Who Have It

More than 100 million Americans — more than ***51%*** of persons ages 3 and over, and ***89%*** of men and women over age 45 — use glasses or contact lenses to correct their vision. See National Center for Health Statistics (NCHS), *Eye Care Visits and Use of Eyeglasses or Contact Lenses: United States 1979 & 1980*, Vital & Health Stat., Series 10, No. 145, at 1, 7, 28 (1984); see also National Advisory Health Council, *Vision Research — A National Plan: 1999-2003*, U.S. Dep't of Health and Human Servs., NIH Pub. No. 98-4120, at 7 (1998) ("[M]ore than 100 million people need corrective lenses to see properly."). About half of those — approximately 24% of American adults — have uncorrected distance vision worse than 20/40. See NCHS, Jean Roberts, *Binocular Visual Acuity of Adults: United States 1960-62*, Series 11, No. 3, at 3 (Table A) (1964) (24.2% in the early 1960s); David J. Lee, et. al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 OPHTHALMOLOGY 552, 554 & Table 1 (1998) (range of 21.3-31.2% depending on race and ethnicity). Rates of nearsightedness (myopia) increase significantly with rises in education and income. Robert D. Sperduto, et al., *Prevalence of Myopia in the United States*, 101 ARCH. OPHTHALMOLOGY 405, 407 (1983); Joanne Katz, et al., *Prevalence and Risk Factors for Refractive Errors in an Adult Inner City Population*, 38 INVESTIGATIVE OPHTHALMOLOGY & VISUAL SCIENCE 334, 336-339 & Figure 2 (Feb. 1997). Contact lenses are worn by 26 million Americans. National Ass'n of Attorneys General, *Seventeen Attorneys General File Comments on FTC's Spectacle Prescription Release Rule*, 5 NAAG ANTITRUST REP., at 7, 9 (Sept./Oct. 1997).

Even moderate nearsightedness makes it difficult to perform many modern activities without corrective measures. For example, a sizable majority of the States require drivers of private vehicles to have visual acuity (corrected or uncorrected) of 20/40 or better. Lawrence E. Decina, et al., *Visual Disorders and Commercial*

United Parcel Serv., Inc., No. 97-1992. But we focus on nearsightedness specifically because it is the disability involved in this case, and because we recognize the possibility that this Court could decide this case on narrower grounds than those elaborated below. See pp. 43-44, *infra*.

Drivers, U.S. Dep't of Trans. Pub. No. FHWA-MC-92-003, HCS-10/1-92(200)E, at A-15 (Nov. 1991). Thus, most of the one-quarter of American adults whose uncorrected distance vision is worse than 20/40 cannot legally drive without their glasses or contact lenses.

Because corrective lenses are so popular and effective in remedying common visual deficiencies, visual impairments are customarily defined assuming the use of corrective lenses. In countless settings, only those individuals whose problems ***cannot be remedied*** with lenses are considered visually impaired. See National Advisory Health Council, *Vision Research - A National Plan: 1999-2003*, at xvii ("Vision impairment can be defined as any chronic visual deficit that impairs everyday function ***and is not correctable by ordinary eyeglasses or contact lenses.***") (emphasis added); see also NCHS, *Current Estimates From the National Health Interview Survey, 1995*, Vital & Health Stat., Series 10, No. 199, at 147 (1998) (asking survey participants if they have any "trouble seeing with one or both eyes EVEN when wearing glasses"); NCHS, *Current Estimates From the National Health Interview Survey, 1982*, Vital Health Stat., Series 10, No. 150, at 149 (1985) (same). The Social Security Administration defines visual impairment as ***corrected*** visual acuity between 20/40 and 20/200, and defines blindness as ***corrected*** visual acuity of 20/200 or worse. See James M. Tielsh, *The Prevalence of Blindness and Visual Impairment Among Nursing Home Residents in Baltimore*, 332 NEW ENG. J. MED. 1205, 1205-1207 (1995). The World Health Organization defines visual impairment as ***corrected*** visual acuity between 20/40 and 20/400 and blindness as ***corrected*** visual acuity of 20/400 or worse. *Ibid.*

For nearly every purpose, good corrected vision is viewed as indistinguishable from good uncorrected vision. In every State, persons who use corrective lenses are permitted to obtain driver's licenses, boating licenses, hunting licenses, and even pilot's licenses. Many of the country's most highly paid professional athletes use corrective lenses. There is no social stigma associated with the use of corrective lenses. Movie stars, CEOs, anchormen, Senators, and Supreme Court Justices use corrective lenses. There is no history of isolation and segregation of the nearsighted.

Because corrective lenses are so effective, nearsighted people can and do perform nearly every type of job in our economy, without any need for accommodation. In a narrow range of jobs, however, the possibility that corrective lenses will fail at a critical time

is viewed as presenting unique risks. Accordingly, some employers require firefighters, law enforcement officers, and pilots to meet visual acuity standards for both their ***corrected*** and ***uncorrected*** vision. Employers, including governmental employers, sometimes reach the judgment that even a small risk of mishap should be avoided in light of the gravity of a vision failure at an acutely dangerous moment such as the emergency operation of a plane or a high-speed chase of criminals. The United States itself employs such standards. For example, the Air Force requires its pilots to have uncorrected distance vision of 20/50 or better; the Navy has an even higher standard, insisting that its pilots have 20/30 or better uncorrected vision. See U.S. Air Force Academy, 1998-1999 CATALOG 170; U.S. Navy, MANUAL OF THE MEDICAL DEPARTMENT, Article 15-65 (Change 107, Oct. 29, 1992).[6] FBI and Secret Service agents must have uncorrected distance vision no worse than 20/200 and 20/60, respectively. See Federal Bureau of Investigation, *Frequently Asked Questions About the FBI*, Question 12 <http://www.fbi.gov/faq/fbifaq.htm>; U.S. Secret Service, *Special Agent Requirements* <http://www.ustreas.gov/usss/opportunities_agent.htm>.

B. The ADA Protects A Discrete Minority Of Substantially Impaired Individuals, Not Those With Widespread, Trivial Impairments Like Correctable Nearsightedness

The language, structure, and legislative history of the ADA plainly reflect its purpose of protecting from discrimination and promoting the employment of persons whose serious physical or mental impairments prevent them from functioning at the level of the average person. As this Court has stated, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). When Congress enacted and the President signed the ADA, they plainly intended to ***preserve*** certain elements of employer discretion. In particular, they chose to allow employers to consider physical characteristics in making

[6] Until 1994, the Federal Aviation Administration required commercial airline pilots to have uncorrected distance visual acuity of 20/100 or better, unless they obtained a waiver. The American Medical Association recommended retention of an uncorrected vision standard. A.L. Engelberg and T.C. Doege, *Review of Part 67 of the Federal Air Regulations and the Medical Certification of Civilian Airmen*, Vol. 1, at 1-7 (1986).

employment decisions affecting individuals whose minor impairments (such as correctable nearsightedness) place them well within the norm of working Americans.

1. The findings of fact that preface the ADA comprise a revealing discussion of the specific societal problem that Congress and the President sought to address by enacting the statute. Congress and the President intended to improve the circumstances of a limited group of significantly impaired people who had suffered from discrimination, isolation, and underemployment — not to give people with widespread and trivial impairments the right to seek judicial review of employers' job qualification standards.

The ADA's very first finding of fact states that ***"some 43,000,000 Americans*** have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (emphasis added). That figure — which on its face excludes the more than 100 million Americans who wear corrective lenses — closely tracks contemporaneous government estimates of the size of the disabled population. Those figures included 12.8 million Americans with ***uncorrectable*** visual impairments, but did not include the far greater number who have ***correctable*** vision problems. See p. 20, *infra*.

The findings describe a statutorily protected group that plainly does not include people who wear glasses or contact lenses to correct nearsightedness. The findings describe individuals with disabilities as "a ***discrete and insular minority*** who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C. § 12101(a)(7) (emphasis added). They further note that, "historically, society has tended to isolate and segregate individuals with disabilities." *Id.* § 12101(a)(2). Those descriptions of the protected class — descriptions that are a prominent part of the text that each legislator considered in voting on the legislation, and that the President considered in deciding to sign it — would have led any reasonable reader to conclude that the statute does not concern itself with people with correctable vision conditions, who comprise close to half of the population, have suffered no isolation, and likely have disproportionately high representation among the most powerful people in our nation.

The findings also emphasize the chronic underemployment and social disadvantages of the disabled, stating that they, "as a group, occupy an inferior status in our society, and are severely disadvan-

taged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6). They observe that discrimination against the disabled "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(9). Nearsighted people are, as a class, neither disadvantaged nor underemployed, but in fact have higher than average education and income. Petitioners themselves apparently have had no difficulty securing employment, and in their chosen field.

The findings also emphasize the persistent problem of pervasive discrimination against the disabled. 42 U.S.C. § 12101(a)(2), (3). But there is simply no argument that those who use ordinary corrective lenses have been the victims of widespread discrimination in the United States, in employment or otherwise.

In sum, those who wear glasses and contact lenses are not a discrete and insular minority saddled with a history of discrimination, exclusion, or underemployment. Nor, given the overwhelming numbers of people who would be added to the ranks of the "disabled" if nearsightedness is deemed a disability, would those statements remain true even as generalizations. ***Approximately 25% of all Americans are nearsighted*** (Sperduto, *supra* at 45), ***and more than half of the population uses glasses or contact lenses to correct nearsightedness or other vision problems***. Nearsighted individuals face no unique challenges, no social disadvantages, and no difficulty obtaining employment. Although some nearsighted persons have been excluded from a narrow range of jobs because the possible failure of their corrective lenses presents special risks, the average person with good vision also finds some jobs out of reach because of other physical traits. Thus, nearsighted people were clearly not the targets of the ADA's goals "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" (42 U.S.C. § 12012(a)(8)) for the disabled.

2. The structure and detailed provisions of the ADA are consistent with its stated purpose of addressing the problems of a discrete and insular minority of seriously impaired individuals. Rather than subjecting to judicial scrutiny ***all*** employment decisions based on physical characteristics, the Act defines a protected class of disabled people and imposes obligations on employers ***only with respect to that class***. In that respect, the ADA differs from laws like Title VII that entirely bar decisions based on race or gender. The

ACLU correctly observes (Br. 19 n.12) that Title VII "covers every single person in this country because everyone has a race and a gender," but it errs in suggesting that the ADA is similarly encompassing. Because the ADA — both in its findings and its substantive provisions requiring proof of a "disability" before any other question is reached — establishes a threshold through which only a discrete minority of the population can pass, it is more like the Age Discrimination in Employment Act, which bars decisions based on age that affect people forty or older, but allows such decisions when they affect younger people. See generally *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). By conscious design, physical characteristics and age have ***not*** been completely removed from employers' permissible decisionmaking processes, nor has Congress broadly required employers to justify every instance in which physical characteristics or age is taken into account. Rather, Congress has chosen to keep the law — and litigation — within bounds by limiting statutory protection to a defined class, despite the possibility that a characteristic might be misused against someone who is not a member of that class.

Because the ADA preserves the rights of employers to make decisions based on their employees' physical characteristics except when the employee is "disabled" ***and*** the employer lacks an affirmative defense, the statute's definition of the protected class performs a crucial gatekeeping function. Once an individual is classified as having a disability, his relationship with actual and potential employers undergoes a sea change.

As noted above, Congress did not intend the ADA to interfere generally with employers' rights to use whatever selection criteria they decide are appropriate for any job (subject, of course, to civil rights laws restricting the misuse of race, gender, age, and other often-irrelevant criteria). If employment selection criteria screen out individuals who meet the definition of "disabled," however, they must be justified as job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6). Likewise, unless and until the ADA is triggered, Congress has not required that employers modify jobs or equipment to suit specific needs of their employees. By contrast, unless it would cause the business "undue hardship," the Act requires employers to provide accommodations — including job restructuring and the modification of facilities — for qualified individuals with disabilities. *Id.* § 12112(b)(5)(A). The definition of

who is disabled under the ADA determines which individuals can lay claim to these and other special protections.

To limit the ADA's cost to employers, its intrusion into the employment relationship, and its litigation-generating potential, Congress defined the protected class in a manner consistent with the statute's goals. The Act narrowly defines "disability" as "a physical or mental impairment that ***substantially limits*** one or more of the ***major life activities***" of an individual. 42 U.S.C. § 12102(2)(A) (emphasis added). The "ordinary or natural meaning" of the phrase "requires that an impairment *significantly restrict* an individual's ability to perform a major life activity." *Halperin* v. *Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (emphasis in original). Thus, the ADA covers only those whose impairments present a significant challenge in their lives. As many courts have ruled outside the context of visual impairments or corrective measures, the ADA does not protect individuals with minor impairments. See, *e.g.*, *Williams* v. *Channel Master Satellite, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (inability to lift more than 25 pounds because of back injury not a disability), cert. denied, 520 U.S. 1240 (1997); *Kelly* v. *Drexel Univ.*, 94 F.3d 102, 106 (3d Cir. 1996) (moderate restriction on ability to walk not a disability).

The EEOC's regulations defining "substantially limited" accord with Congress's intention to protect only those whose impairments cause them to function below the norm of working Americans. According to the regulations, "substantially limited" means:

> (i) Unable to perform a major life activity ***that the average person in the general population*** can perform; or
>
> (ii) ***Significantly restricted*** as to the condition, manner or duration under which an individual can perform a particular major life activity ***as compared to*** the condition, manner, or duration under which ***the average person in the general population*** can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (emphasis added). By requiring that an individual be significantly restricted as compared with the average person in the general population before he or she is considered disabled, the regulations exclude from the protected class individuals whose physical limitations do not place them outside the mainstream, and thus carry out Congress's intention to preserve the existing relationship between such people and employers.

The plain language of the ADA's definition of disability powerfully establishes that people like petitioners who have correctable nearsightedness are not within the statute's protected class. Under both the natural meaning of "substantially limited" and the EEOC's regulatory definition, the impairment must "significantly restrict" the manner in which petitioners see as compared to the way "the average person in the general population" sees. That plainly does not describe petitioners' circumstances. With their corrective lenses, petitioners have perfect visual acuity and are restricted from no activities that require them to see. Wearing corrective lenses, moreover, neither imposes additional restrictions on petitioners nor distinguishes them from "the average person in the general population," who also needs corrective lenses to see. Accordingly, there is "simply no evidence that [petitioners have] 'a physical or mental impairment which substantially limits one or more of such person's major life activities.'" *Padilla* v. *City of Topeka*, 708 P.2d 543, 550 (Kan. 1985) (applicant for police officer position whose nearsightedness was correctable to 20/20 was not "handicapped" within the meaning of the Rehabilitation Act).

Petitioners claim that their "major life activity of seeing is restricted in that they cannot perform it without the aid of corrective measures." Pet. Br. 31. But the plain language of the disability definition requires that the "major life activity" of "seeing" be analyzed functionally, not by considering the mechanics or quality of vision in isolation. Some lower courts have recognized

> that a visual impairment which hinders, or makes it more difficult for an individual to function at full visual capacity, does not amount to a substantial limitation on one's ability to see ***where the evidence suggests the individual can otherwise conduct activities requiring visual acuity***.

Cline v. *Fort Howard Corp.*, 963 F. Supp. 1075, 1080 (E.D. Okla. 1997) (emphasis added); see also, *e.g.*, *Padilla*, 708 P.2d at 550 (noting that the plaintiff "has worn glasses since his grade school days and has testified to no problems or limitations in his activities"). Any other approach would render the definition tautological — *i.e.*, one with a visual impairment that impairs vision is disabled — and would essentially read the limiting phrase of the disability definition out of the statute with respect to visual and other sensory impairments.

After performing similar analyses, many courts have ruled under both the ADA and its predecessor, the Rehabilitation Act, that individuals with correctable vision problems are not disabled. As one court noted, "Moderate vision impairment[s], although certainly an undesirable inconvenience, do[ ] not substantially limit an individual's ability to see, to read, or to work." *Sweet* v. *Electronic Data Sys., Inc.*, 1996 U.S. Dist. LEXIS 5544, at *14 (S.D.N.Y. Apr. 26, 1996); see also *id.* at *16 (with ***corrected*** vision of 20/80 in one eye, plaintiff's "ability to engage in the major life activity of seeing has been limited, but not substantially limited").[7] Indeed, several courts have held that people with ***uncorrectable*** vision problems are not disabled, as long as they can see well enough to function within the range of the average person.[8] It would be exceedingly odd if the ADA embraced persons with completely correctable nearsightedness because they ***would*** see badly if they failed to wear their glasses, but excluded those with ***uncorrectable*** vision impairments who actually function less well than such persons do.

Petitioners and their *amici* attempt to bring their impairment

[7] See also cases cited in note 2, *supra*; cf. *Walker* v. *Aberdeen-Monroe County Hosp.*, 838 F. Supp. 285 (N.D. Miss. 1993) (plaintiff whose vision was correctable to 20/30 with steroids and eye drops was not disabled). Several of these courts concluded that correctable nearsightedness was not even an "impairment" for purposes of the Act. Cf. *Jasany* v. *United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985) ("Characteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by the statute because they are not impairments.") (footnote omitted). The court of appeals rejected United's argument that nearsightedness is not an impairment; we do not press the argument here because, even if petitioners' nearsightedness is an impairment, it does not substantially limit a major life activity.

[8] See *Still* v. *Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (per curiam) (plaintiff, who "drives both cars and motorcycles, and is a certified marksman," is not disabled because he is blind in one eye; "although his peripheral vision is limited by his partial blindness, [plaintiff] is still able to perform normal daily activities"); *Chandler* v. *City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) (plaintiff's uncorrectable poor vision in one eye did not render him "handicapped" under the Rehabilitation Act); *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995); *Santiago* v. *Temple Univ.*, 739 F. Supp. 974, 978 (E.D. Pa. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991).

within the definition of disability, and to suggest a limit to the potential sweep of a ruling in their favor, by arguing that their nearsightedness is exceptionally severe. Pet. Br. 38-40; Gov't Br. 11; AIDS Action Br. 24. The perhaps greater-than-average severity of petitioners' nearsightedness is a distinction without a difference, however. In their everyday lives, petitioners function identically to the more than half of Americans whose uncorrected eyesight is sufficiently poor that they must use corrective lenses to perform their daily activities. And it is not at all clear that petitioners' ***uncorrected*** nearsightedness would limit their activities substantially more than milder (and more common) uncorrected nearsightedness would. As noted above, most States require visual acuity of 20/40 or better to obtain a driver's license. Thus, if petitioners were deemed disabled, then all persons with uncorrected vision worse than 20/40 would also be disabled, because they (like petitioners) would be able to claim that they cannot drive without corrective lenses. See *Norris* v. *Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1433 n.13 (N.D. Cal. 1996) ("the jury could have reasonably felt that, at least in California, driving is a major life activity"). There is no escaping the conclusion that a decision that petitioners are "disabled" would dramatically expand the reach of the ADA and unmoor it from the goals that motivated its enactment.[9]

3. Although the statutory language and structure alone clearly establish that Congress did not intend to include people with correctable nearsightedness within the ADA's protected class, the legislative history confirms that conclusion. As the district court noted below, the legislative history reflects that "the type of visual impairment contemplated by the legislation is of a degree beyond that correctable by glasses or contact lenses." J.A. 41.

First, the express references to visual impairments in the committee reports contemplate serious visual impairments that cannot be remedied by ordinary corrective lenses. The House

[9] Petitioners' (and the Government's) effort to win this case by gerrymandering a class that includes them but excludes many others, in fact, gives rise to severe anomalies. Consider, for example, a person whose 20/50 uncorrected vision might be considered "average," but who for some reason ***cannot*** use lenses to improve his vision to anything better than 20/50. Such a person might be left uncovered by the ADA, with the one-two punch of consideration in an unmitigated state ***only*** and comparison to the "average" person in that state (Gov't Br. 10-12).

Report notes that:

> For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [*sic*] visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess., at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 346.

Second, the legislative history confirms that the 43 million disabled Americans cited in the statute's findings ***did not include people with correctable nearsightedness.*** The ADA's findings of fact, including their estimate of the number of disabled people in America, had their origin in a report prepared by the National Council on the Handicapped (now the National Council on Disability) entitled *On the Threshold of Independence*. The report included proposed legislation that began with the finding that "some thirty-six million Americans have one or more physical and mental disabilities." *On the Threshold*, at 27 (Jan. 1988).[10] The Council derived that number from a 1986 Census Bureau study indicating that 37.3 million Americans over the age of 15 had difficulty performing basic physical activities. *Id.* at 9. The report makes it clear that the Census Bureau was counting only people with ***uncorrectable*** visual impairments. *Ibid.* ("Some 12.8 million people, or 7.1 percent of the population studied, had trouble seeing words and letters in ordinary newsprint, ***even with glasses or contact lenses.***") (emphasis added).[11]

The first versions of the ADA proposed in the Congress included virtually the same findings as the Council's draft, including the 36 million figure. See S. 2345, 100th Cong., § 2(a) (1988);

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[10] The conference reports make clear that the Congress was relying heavily on the Council. See H.R. Conf. Rep. No. 101-558, 101st Cong., 2d Sess., at 81 (1990) ("The conferees intend to recognize the National Council on Disability as the impetus, force, and originator of the initial legislation for the Americans with Disabilities Act."); H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess., at 85 (1990) (same).

[11] This methodology is consistent with that long used by the National Center for Health Statistics (NCHS) to determine the number of people with visual impairments and with the definition of visual impairment given by the National Advisory Eye Council. See p. 11, *supra*.

H.R. 4498, 100th Cong., § 2(a) (1988). A year later, Representative Coelho reintroduced the ADA and noted that, although "the last U.S. census numbered the disabled at 36 million[,] [e]stimates indicate that the number has risen to 43 million since then." 135 Cong. Rec. E1575-01 (daily ed. May 9, 1989). Recent Census Bureau reports show that the updated figure, like the earlier one, excluded people with correctable vision conditions. See STATISTICAL ABSTRACT OF THE UNITED STATES 138 (Table 209) (115th ed. 1995) (listing approximately 11 million people as visually disabled).

Third, the legislative history underscores Congress's belief, reflected in the findings of fact, that the disabled tend to be poorer, less well educated, and lower on the social scale than people without disabilities. The House Report states, for example:

> Compared with persons without disabilities, persons with disabilities are much poorer, have far less education, have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life.

H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 445, 465 (footnote omitted). As discussed above, it is well documented that individuals with nearsightedness are (as a group) ***wealthier and more highly educated*** than average. See p. 10, *supra*.

Thus, this is not a case in which petitioners merely seek to apply the ADA in a "situation[ ] not expressly anticipated by Congress," where an unambiguous text "demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 118 S. Ct. 1952, 1956 (1998). Rather, petitioners' highly doubtful reading of the statutory text would cause the statute to ***contradict*** positive indications in the legislative history that Congress ***did*** anticipate application of the statute to vision impairments and did not intend that it apply to fully correctable nearsightedness.

II. AN IMPAIRMENT DOES NOT "SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY" IF IT CAN BE CORRECTED EASILY

Petitioners concede that they can see perfectly well with their corrective lenses. They neither identify any functional impairment of their vision when they use corrective lenses nor contend that the use of corrective lenses itself causes them any actual difficulties.

Instead, they claim that they are disabled because they ***would*** be substantially limited in seeing ***if*** they did not wear their glasses. Relying on statements in interpretive guidance issued by the EEOC, they ask this Court to adopt a general rule that courts may ***never*** consider the effect of corrective measures when deciding whether an individual is disabled. In other words, they argue that the disability determination should depend purely on the ***hypothetical*** effects of the impairment in the absence of corrective measures, rather than the ***actual*** effects of the impairment in the real world.

To accept the EEOC's guidance and apply it to this case, however, would effect a sweeping expansion of the ADA. As discussed above, Congress enacted the ADA to address the problems of a discrete and insular minority of individuals who, because of their significant impairments, had faced discrimination, isolation, and underemployment. Both the plain language of the statute and its overall structure and meaning reflect the congressional purpose to limit the Act's protection to a discrete group of physically disadvantaged people. There is no support in the statute for the view that Congress meant to include within the ADA's protected class the more than 100 million Americans who, like petitioners, have readily correctable impairments that have a trivial impact on their lives. Accordingly, this Court should reject both the EEOC's guidance and petitioners' claims.

A. This Court Should Reject The EEOC's Directive To Ignore Corrective Measures When Making The Disability Determination

Petitioners rest their claim to ADA coverage on statements in interpretive guidance that the EEOC published along with its regulations under the ADA. In the interpretive guidance, the EEOC stated that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures, such as medication, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998).[12] Petitioners argue that this Court must

[12] The interpretive guidance also states that the determination of whether an individual has an impairment should be made without regard to mitigating measures. "For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the conditions were correctable through the use of a hearing aid." 29 C.F.R. pt. 1630, App. § 1630.2(h), at 347 (1998). We agree that the use of mitigating measures is irrelevant to the determination of whether there is an underlying impairment. Mitigating measures are instead relevant to the next stage of the analysis, which addresses the ***effects*** of the impairment, and determines whether the impairment "substantially limits a major life activity" of the particular individual.

defer to the EEOC's rule, and, for purposes of the disability determination, treat petitioners as though their glasses did not exist.

"Although an agency's interpretation of a statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'" *Southeastern Comm. College* v. *Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters* v. *Daniel*, 439 U.S. 551, 566 n. 20 (1979)) (rejecting HEW regulations implementing Rehabilitation Act). The EEOC interpretation on which petitioners rely should be rejected because it conflicts with the plain meaning of the ADA, and its structure and purpose.

1. The EEOC interpretive guidance does not merit special deference

The interpretation at issue is not a regulation promulgated under the Administrative Procedure Act pursuant to a congressional delegation of authority, but appears in guidelines published in an appendix to regulations implementing Title I. "[C]ourts properly may accord less weight to such guidance than to administrative regulations which Congress has declared have the force of law." *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976).

The regulations to which the guidance is appended contain definitions of each part of the statutory definition of disability, including the phrases "physical or mental impairment," "major life activities," and "substantially limits." 29 C.F.R. § 1630.2(h), (i), (j). The regulatory definitions do not mention corrective measures. The appended guidance document, however, states that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures, such as medication, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998).

Petitioners argue that this interpretive statement should be accorded full deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because it was subject to notice-and-comment rulemaking. Pet. Br. 15-16; see also 97-1992 Gov't Br. 19. That assertion is misleading. First of all, publishing guidance in the Federal Register along with a final or proposed rule is not the same as issuing a regulation for formal notice and comment under the APA. See *Headrick* v. *Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (comment to final regulations was "a purely interpretive rule, unpromulgated under the [APA]," and accordingly the court was "in no way bound to afford it any special deference"). The EEOC so recognized in publishing ***this*** interpretive guidance, inviting comment on only a portion of it, and not on the portion relevant here. See 56 Fed. Reg. 8578 (1991).

More important, the draft guidance published in the Notice of Proposed Rulemaking that contained the regulations ***did not contain the statement on which petitioners rely so heavily.*** 56 Fed. Reg. 8578, 8593 (1991). As originally proposed, the sentence at issue read in full: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis." *Ibid.* Only when it published its regulations and the guidance in final form did the agency add to that sentence the thirteen-word phrase that petitioners contend requires a ruling that they are "disabled." 56 Fed. Reg. 35,726, 35,727 (1991). The agency explained that it had revised the guidance to

> respond to comments from disability rights groups, which were concerned that the discussion [of the meaning of "substantially limits"] could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

Id. at 35,728.[13] Thus, the regulated community had no notice that it would be subject to a categorical rule that corrective measures

[13] The Government suggests that the EEOC should receive credit for "consistently interpreting" the rule, and describes what seem to be two separate occasions when the agency addressed the issue. 97-1992 Gov't Br. 18-19. The two statements described by the Government, however, appeared in the very same document, which contained the final version of the regulations and the appendix (which later were published in the Code of Federal Regulations) and an explanatory preamble.

were never relevant to the disability determination. In fact, only "disability rights groups" had the opportunity to consider the import of, and comment on, the interpretation at issue here.[14]

Nor is it true, as petitioners claim (Pet Br. 16), that the guidance at issue is entitled to high level of deference accorded to an agency's interpretation of its own regulations. The language at issue does not construe the regulations. At most, it adds an additional gloss (which the EEOC did not see fit to include in its regulations) to the ***statutory*** definition of disability. While we contend that the guidance is entitled to ***less*** deference than a ***regulation*** interpreting a statute that the agency has been entrusted to administer, it surely is not entitled to receive ***more*** deference through treatment as an interpretation of a regulation that the agency has written.

"[W]ell-reasoned" views of an agency do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bragdon*, 118 S. Ct. at 2207 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)). The weight to be accorded the interpretation, however, depends on, among other things, "the thoroughness evident in its consideration." *Skidmore*, 323 U.S. at 140. "The EEOC guideline in question does not fare well under these standards." *General Elec.* v. *Gilbert*, 429 U.S. at 142. As noted above, the guideline appears to have been added to the interpretive guidance as a result of pressure from advocacy groups with an interest in the broadest possible interpretation of the ADA. Groups having an interest in cabining the statute had no opportunity to point out the problems inherent in a rule categorically barring consideration of mitigating measures —

[14] The version of the interpretive guidance published with the proposed rule did note that "[a]n individual who uses artificial legs would * * * be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices," and that "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." 56 Fed. Reg. at 35,741. But those examples are consistent with the consideration of corrective measures in other instances, and are far from the strict rule requiring disregard of even the most effective and least burdensome remedies that petitioners now argue was issued for notice and comment. The EEOC acknowledged as much when it stated that its discussion of "substantially limits" could be "misconstrued" to exclude people with controlled impairments.

for example, that people like petitioners with impairments having a trivial impact on their lives would be protected.

Moreover, as the court of appeals noted (J.A. 64-65), the interpretation is at odds with other parts of the EEOC's regulation and guidance. First, the guidance explains that "an employee [who] has ***controlled*** high blood pressure that is not substantially limiting" would be covered under the "regarded as" prong of the disability definition if his employer viewed him as substantially limited. 29 C.F.R. § 1630, App. § 1630.2(*l*) para. 6 (emphasis added). That statement strongly conveys that it is the employee's "control" of his high blood pressure that renders it "not substantially limiting."[15]

Second, in discussing the term "substantially limits," the interpretive guidance states that "whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather ***on the effect of that impairment on the life of the individual.***" *Id.* § 1630.2(j) para. 2 (emphasis added). As the court of appeals aptly explained, "the EEOC recognized that it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA." J.A. 65. It is surely hard to square the EEOC's language with an absolute rule that corrective measures must always be disregarded.

2. The EEOC's directive to ignore corrective measures conflicts with the plain meaning of the statute

Whatever weight this Court decides to grant the EEOC's views, the guidance should be rejected because it does violence to the language and purposes of the statute. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986), quoted in *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 43 (1990); see also *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."). The conclusion that Congress

[15] Petitioners claim that "the phrase suggests that controlled high blood pressure may or may not be substantially limiting, depending upon the severity of the underlying condition (without medication)." Pet. Br. 15 n.16. But that explanation renders the EEOC's use of the word "controlled" entirely superfluous, and is unconvincing.

did not intend to preclude the consideration of corrective measures emerges from a review of the text of the disability definition and the statute's structure and enumerated purposes.

1. As the court of appeals ruled, the portion of the EEOC's guidance on which petitioners rely must be rejected because it is "in direct conflict with the plain language of the ADA." J.A. 64. "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The definition does not end with the word "impairment." Congress could easily have drafted a statute that prohibited discrimination based on any physical impairment (subject to the affirmative defenses), but it did not do so.[16] The definition of disability must be read in light of the express intent to sort out impairments meriting protection under the ADA from those that do not.

This Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984). What separates protected from unprotected impairments is the requirement that the impairment "substantially limit[ ] one or more of the major life activities of such individual." Each part of that phrase, when given its natural meaning, lends support to the conclusion that corrective measures cannot be ignored when deciding whether an individual is disabled.

First, as noted above, the "ordinary or natural meaning" of the phrase "substantially limits" requires that an impairment "*significantly restrict* an individual's ability to perform a major life activity." *Halperin*, 128 F.3d at 199. By including only significant restrictions, the definition ***excludes*** insignificant, unimportant, or trivial restrictions. Even if the need to use a corrective device to perform a major life activity is a "limitation" or "restriction" on that activity, it is not necessarily a significant restriction. A person who can perform a life activity with no functional deficit by using a simple, painless, and inexpensive corrective measure does not face a "significant restriction" in that life activity. To rule otherwise is "to read out of the act's first definition of disability the re-

[16] In fact, the draft legislation originally proposed to Congress by the National Council on the Handicapped would have prohibited discrimination based on any impairment, but Congress chose to add the "substantially limits" requirement. See *On The Threshold*, at 28-29.

quirement that it applies only to those persons who are 'substantially limited' in major life activities." *Schluter* v. *Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

A directive to ignore corrective measures also offends the form of the operative limiting phrase. By employing the phrase "substantially limits one or more major life activities" in the present indicative form, Congress conveyed its concern with substantial limitations ***that actually exist***. See *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). Thus, the ADA does not authorize a hypothetical inquiry into a set of facts that might exist if an individual abandoned the corrective measures that actually minimize or eliminate the effects of his impairment. As the court of appeals stated, the disability determination is "concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." J.A. 64. See also *Gilday* v. *Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) ("I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication").

Disregarding available mitigating measures also defies the statutory command to examine the effect of the impairment on "the major life activities ***of such individual.***" As the court of appeals ruled, that phrase conveys the need for an individualized analysis of the effects of the impairment that is rooted in the facts of each particular case. See *Ryan* v. *Grae & Rybicki, P.C.*, 135 F.3d 867, 872 (2d Cir. 1998) ("the determination whether an impairment 'substantially limits' a major life activity is fact specific"); *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1396 (5th Cir. 1993) (recognizing that "the effect of a given type of impairment * * * can vary widely from individual to individual"). Nothing in the statute permits courts to exclude from this case-by-case factual analysis information concerning measures that the individual uses to correct an impairment when such information indisputably is relevant to the actual effect of the impairment on an individual's life.

Finally, to disregard the individual's use of corrective measures also ignores the definition's use of the term "life activities." By defining disability with respect to limitation on "life activities," Congress conveyed its intention to protect those individuals who are

substantially limited in ***doing*** the things that other people ***do***. In other words, Congress cared about impairments that had functional, as opposed to existential, consequences. The EEOC guidance ignores that language and elevates form over function.

2. The plain meaning of the phrase "substantially limits a major life activity" can be discerned, not only by giving those words their ordinary and natural meaning, but also by considering their function in the context of the entire Act. As this Court has stated:

> Statutory construction * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Ass'n v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); see also *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("the plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences"); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."); *K mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

Even if the words "substantially limits" were ambiguous read in isolation, their meaning would be clarified by considering their function in the context of the entire Act. If "the statute, as a whole, clearly expresses Congress' intention," the Court "decline[s] to defer to [the agency's] interpretation." *Dole* v. *Steelworkers*, 494 U.S. at 42. Only an interpretation that excludes from the ADA's protected class people whose physical limitations have been successfully corrected "is compatible with the rest of the law."

First, a rule that ignores the effects of corrective measures would be inconsistent with the statutory findings that preface the ADA. See 42 U.S.C. § 12101. This Court has found such congressional statements of purpose "useful * * * [in] detailing Congress' purposes in enacting [a] statute" and thereby clarifying the meaning

of one of its provisions. *Dole* v. *Steelworkers*, 494 U.S. at 36-37 (invalidating OMB interpretation of provision of the Paperwork Reduction Act because it did not further "Congress' enumerated purposes"). As discussed above (at 13-14), the statutory findings make clear that Congress was concerned with providing a remedy for Americans whose functional limitations had caused them to suffer discrimination, isolation, and underemployment. The congressional finding that 43 million Americans were disabled was based on statistics that focused on such practical limitations. See pp. 20-21, *supra*. It would offend Congress's purpose as expressed through its statutory findings to sweep under the umbrella of the ADA persons whose impairments have virtually no practical impact on their lives — especially since such an interpretation would cause explosive growth of the population covered by the statute.

Second, the EEOC rule offends Congress's intention to draw a rational line around a protected class of persons whose severe impairments leave them most in need of the Act's remedies. A directive to ignore mitigating measures artificially blinds the statutory sorting mechanism to important factors determining the severity of an impairment, so that the statute ends up protecting individuals who function far better than many who are excluded. For example, a person with an ***uncorrectable*** visual impairment that does not rise to the level of a disability would be excluded from the statute, but a person who can see perfectly well using glasses would be included. See cases cited in note 8, *supra*. Similarly, a person with an uncorrectable back injury that leaves him or her moderately restricted in lifting would be excluded from the statute (see *Williams*, 101 F.3d at 349), but a person with potentially serious arthritis rendered asymptomatic by medication would be included. Congress should not lightly be deemed to have intended such an irrational result.

Trying to separate "the disease [from] its treatment" creates other problems as well. If the EEOC's interpretive guidance were followed to the letter, than a plaintiff who had an impairment that was not substantially limiting but who experienced debilitating side effects from its treatment would not be covered by the ADA. Yet the purposes of the Act surely are served by extending protection to such people. *Gordon* v. *E.I. Hamm & Assocs., Inc.*, 100 F.3d 907 (11th Cir. 1996) (considering whether plaintiff, whose lymphoma did not substantially limit a major life activity, was substantially limited by the effects of his chemotherapy treatments), cert. denied,

118 S. Ct. 630 (1997). Conversely, someone who suffered a dangerous episode of a treatable health problem (such as a heart attack or stroke) would thereafter always be considered disabled, because he might have died without treatment. Courts do not now automatically grant such persons protection under the ADA. See *Katz* v. *City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir. 1996) (explaining that plaintiff would be considered disabled after surviving a heart attack and angioplasty procedures only if his post-treatment limitations were "permanent or persisted on a long-term basis").

Thus, even if the statute is ambiguous, the EEOC's directive to ignore mitigating measures is not "a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866. By contrast, considering ***all*** relevant facts concerning an individual's impairments, including the effects of mitigating measures, permits consistent and rational decisions concerning who is covered by the statute and who is not. Individuals (like petitioners) whose otherwise substantial impairments are corrected through reliable, effective, and non-burdensome measures will not be considered disabled. See *Wilkins* v. *County of Ramsey*, 983 F. Supp. 848, 854 (D. Minn. 1997) (person with medicated depression who "suffers no symptoms" "as long as she takes her medication" was not disabled), aff'd, 153 F.3d 869 (8th Cir. 1998). Individuals whose treatments leave them substantially impaired will be considered disabled. See *Thomas* v. *Davidson Academy*, 846 F. Supp. 611, 617-618 (M.D. Tenn. 1994) (student whose serious autoimmune disorder remained dangerous despite extensive ongoing medical treatment was disabled). Individuals with substantial impairments that are treatable but not perfectly correctable may or may not be considered disabled, depending on the effectiveness of the treatment and the limitations imposed by the treatment itself. See *Cehrs* v. *Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (genuine issue of material fact existed as to whether plaintiff's treated psoriasis was a disability where plaintiff suffered effects of both the disease and her weekly medication); *Coghlan* v. *H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (genuine issue of material fact existed as to whether plaintiff's treated diabetes was a disability because, among other things, plaintiff claimed that his insulin injections caused episodes of hypoglycemia). Those with treatable impairments will be fairly compared with those who have untreatable impairments, according

to the actual limitations each actually experiences. Congress cannot have intended any other result.

3. Petitioners' and their *amici*'s arguments supporting the EEOC interpretation are unconvincing

Petitioners and the *amici* supporting their position argue both from the text of the Act and from its ostensible ends that the disregard of mitigating measures is consistent with the Act or even necessary to effectuate its purposes. Those arguments are unconvincing at best, and at worst suggest a drift (if not an outright leap) toward an interpretation of the Act that would simply prohibit employment actions based on the physical characteristics of employees. None of them rescues petitioners' claims.

1. Petitioners make several textual arguments in favor of the EEOC's rule. First, they contend, the phrase "substantially limits" ***necessarily*** encompasses "the inability to perform a major life activity except with a corrective device." Pet. Br. 31. But "not every impairment that ***affect[s]*** an individual's major life activities is a substantially limiting impairment." *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (emphasis added; footnote omitted). As noted above, a person who uses a corrective device to ameliorate a substantially limiting impairment may well continue to be substantially limited in a major life activity, either because the device does not completely correct the impairment, or because the corrective measure itself imposes new limitations. Nothing in the statutory language, however, gives privileged status to the need for corrective devices in the assessment of what constitutes a substantial limitation, much less suggests that classification as disabled flows *ipso facto* from the need for such corrective measures.

Second, petitioners argue that the Tenth Circuit's rule "adds terms to the Act that Congress chose not to employ." Pet. Br. 34. It is petitioners, however, who seek to add terms to the disability definition and change its verb form: their rule would change the phrase "substantially limits" to "would without correction substantially limit." Nothing in the statute justifies such an alteration.

Finally, petitioners claim that Congress could have expressly excepted correctable impairments from the statute, but chose not to do so. Pet. Br. 35. The fact is that the disability definition draws a line between impairments that substantially limit major life activities and those that do not. Both correctable and uncorrectable

impairments may fall on either side of that line. The dichotomy between correctable and uncorrectable impairments is a construct alien to the statute's language and purposes, and little meaning can be attributed to the absence of language addressing the issue.

2. Petitioners and their *amici* also claim that the EEOC rule is consistent with and necessary to effectuate the purposes of the ADA. They insist that the ADA must be interpreted broadly because it is a remedial statute. *E.g.*, Pet. Br. 29; ACLU Br. 5. "That principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995) (citation omitted).[17] Moreover, as this Court has stated, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular goal is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original). That admonition is particularly apt in this case, since expansion of the definition of disability simultaneously ***contracts*** the employer's general discretion to make employment decisions based on physical characteristics — a "competing value[ ]" that the Congress that enacted the ADA regarded as important. See pp. 14-16, *supra*.

More specifically, petitioners and their *amici* argue that a broad definition of disability is required because people have the right to prove that they are qualified for the positions from which they are rejected because of their impairments. According to petitioners, "Congress structured the ADA to define broadly who is disabled, but limited its remedies only to those who can demonstrate they are qualified to perform the work they seek." Pet.

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[17] See also, *e.g.*, *East Bay Mun. Util. Dist.* v. *Department of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998) ("We have recently expressed our general doubts about the canon that 'remedial statutes are to be construed liberally,' since virtually any statute is remedial in some respect."); *Bushendorf* v. *Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) ("It will not do to intone the hoary canon that remedial statutes are to be construed liberally. This is one of the least persuasive of the canons; * * * we [have] called it 'useless.'").

Br. 27; see also Harkin Br. 7 ("The proper approach * * * is to broadly interpret the definition of disability, so that a fact-specific inquiry into the individual's qualifications can be pursued.").

By giving primacy to the pursuit of a "fact-specific inquiry into the individual's qualifications," however, petitioners and *amici* put the cart before the horse. As this Court observed when it construed the Rehabilitation Act in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), "only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." *Id.* at 284 (emphasis in original). An individual must first make the threshold showing ***that he is disabled*** before he can complain that he was rejected for a job based on physical shortcomings despite his ability to perform the job's "essential functions." As discussed above, the Act purports neither to do away with employers' freedom to impose physical qualifications (even unsubstantiated ones) on potential employees, nor to give all employees the opportunity to litigate over whether they are actually qualified for positions whose physical standards they do not meet. ***Only the disabled*** have that right under the ADA. A policy argument that everyone should have that right is no help in construing the statute that Congress actually passed and the President signed.

Petitioners also contend that considering mitigating measures when determining whether an individual is disabled will deny protection to individuals with serious impairments who manage to control their disabilities sufficiently to perform the essential functions of the jobs they have or seek. Affirmance of the decision below, petitioners and their *amici* dramatically predict, would create a "Catch-22" whereby no qualified individual would be considered disabled, and no disabled individual would be qualified. Harkin Br. 7-9; ACLU Br. 18.

The supposed "Catch-22" is wholly illusory, however. Many people whose controlled impairments allow them to work nonetheless continue to be "substantially limited" in major life activities. As Senator Harkin *et al.* explain helpfully in their brief (at 9-13), many people who suffer from diabetes, epilepsy, and mental illness often remain quite limited at work or otherwise, even with treatment. See also AIDS Action Br. 22 ("[m]any individuals who rely on mitigating measures continue to experience limitations, albeit lessened, that require accommodations"). Contrary to the concerns expressed by these *amici*, such individuals will continue

to be covered under the Act.[18] Those who (like petitioners) completely control their "impairments" with non-burdensome corrective measures, however, will not be considered disabled under the first prong of the disability definition. If their employers discriminate against them because of a misunderstanding of their condition or a fear that it will recur, they will be protected under the second or third prong of the disability definition. All of the goals of the ADA can thus be served without broadening the definition of actual disability to sweep in perfectly able-bodied people like petitioners, whom Congress did not intend to protect.[19]

Petitioners argue that the consideration of mitigating measures would "require courts to dictate what treatments, medications, or other measures each disabled person must undergo." Pet. Br. 27. They raise the specter of judges deciding "whether an impaired person should accept medication with significant side effects, seek out experimental treatments, undergo evasive surgery, and so forth." *Id.* at 30. But, just as the statute's language indicates that the inquiry is actual ("substantially limits") and not hypothetical ("would substantially limit"), so too the language is naturally read to make the disability analysis descriptive, not prescriptive; the court should consider only corrective measures that the individual actually uses when evaluating the impact of the impairment. See *Haworth* v. *Procter & Gamble Mfg. Co.*, 1998 WL 231062 (D. Kan. Apr. 30, 1998) (declining to take into account effects of medications plaintiff does not take regularly for financial/insurance coverage reasons); but see *Testerman*, 1997 U.S. Dist. LEXIS 21392, at *48-*49 (ruling that defendant had raised a genuine dispute as to whether

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[18] Contrary to the views of petitioners' *amici*, statements in the legislative record recognizing that people with chronic conditions like HIV or epilepsy may need workplace accommodations to facilitate their medical treatment ***support*** consideration of the effects (and the demands) of corrective measures when determining whether someone is disabled. See, *e.g.*, AIDS Action Br. 10-11. The medical treatment of a condition obviously does not cause it automatically to lose its status as a disability. For example, this Court had no difficulty deciding in *Bragdon*, 118 S. Ct. at 2206, that the plaintiff was substantially limited in reproduction whether or not the effects of medication were considered.

[19] As we discuss in Part III, *infra*, a person with a controlled impairment will not ***necessarily*** be "regarded as" disabled by an employer that deems him or her physically unsuited for a particular job.

the plaintiff's diabetes would have been substantially limiting if it had been more diligently treated). In any event, like every element of petitioners' parade of horribles, this issue has nothing to do with this case: there is no controversy concerning the actions that petitioners have taken to correct their impairment.

The Government attempts another version of this argument, contending that the consideration of mitigating measures "would lead to a strange instability in the definition of disabilities." 97-1992 Gov't Br. 15. Noting that "many forms of medication and other mitigating measures vary in their effectiveness over time," the Government contends that, by contrast, "determining whether an impairment [without reference to mitigating measures] substantially limits a major life activity is relatively straightforward." *Id.* at 15-16. But there is no basis at all for the government's speculation that the effectiveness of mitigating measures is ***more*** variable over time than is the degree of limitation imposed by impairments themselves. Certainly, when the "impairment" at issue is nearsightedness, common experience as well as government statistics suggest that ***uncorrected*** vision is more likely to change (and change radically) as people age than is the effectiveness of common corrective measures, which can bring the vast majority of the populace to 20/20 corrected vision over most of their lives. Any remaining "instability" is inherent in the case-by-case analysis of the effect of a given impairment on each individual required by the statute. See *Deas* v. *Alternative Addiction Treatment Concepts, Inc.*, 152 F.2d 471 (5th Cir. 1998), petitions for cert. pending, Nos. 98-916, 98-1057. Indeed, the ***failure*** to consider mitigating measures would lead to a strange ***stasis*** in the definition of disabilities, by replacing the evaluation of an impairment's actual effects with the assessment of presumptions about the impairment's possible effects in its untreated state.

Petitioners and their *amici* also claim that the Tenth Circuit's rule will create perverse incentives by "rewarding" people who do not ameliorate their impairments with the right to sue under the ADA. But few people would abandon effective remedies for their impairments merely to obtain rights under the ADA; and any inclination to do so would be checked by the obligation to remain qualified for the job they seek.[20] Petitioners' hypothetical suggestion that

[20] Contrary to the suggestion of petitioners (Br. 29) and the First Circuit in *Arnold*, 136 F.3d at 863 n.7, it is not at all odd that the statute may give less protection to people who take care of themselves than to those who forgo mitigating measures. People are disabled for many reasons, but this statute is not constructed to protect only the most deserving of them. The person who is in a wheelchair because he foolishly jumped out of a window during a college prank is no less entitled to statutory protection as "disabled" than the person who has been unable to walk since birth. The statute's focus, undeniably, is on the individual's condition, ***not*** how the individual came to be in that condition. Similarly, ongoing medical regimens (such as diet and exercise) to treat various conditions may exceed particular individuals' self-discipline. When the consequences of failure to follow "doctor's orders" become severe enough, some individuals, as a result of their own decisions, may be substantially limited in a major life activity while their more self-disciplined friends are not. But the statute humanely affords protection to ***all*** disabled persons including those who have forgone appropriate treatment. The absurdity of reading the unqualified phrase "substantially limits" to require inquiry into an individual's hypothetical activities is far greater than the supposed "absurd results" (Pet. Br. 29) inherent in the possibility that under respondent's non-hypothetical reading a few litigious individuals might forgo treatment and suffer limitation in major life activities just so that they could obtain favorable legal treatment. And judges may well have the tools available to deal with truly abusive litigation-driven tactics. See *Bowers* v. *Multimedia Cablevision, Inc.*, 1998 U.S. Dist LEXIS 19319, at *11 (D. Kan. Nov. 3, 1998) ("the plaintiff cannot gain ADA protection by unilaterally deciding, without justification, not to use prescribed medication which corrects or alleviates his condition").

they would be proper plaintiffs if they threw away their glasses illustrates this. Petitioners are unlikely to give up watching television, driving, and reading to support their right to sue United, and in any event they would have no chance of establishing that they are qualified to fly passenger jets without their glasses.

Petitioners also claim that the Tenth Circuit's reading of the disability definition conflicts with the employer's obligation to provide reasonable accommodations to persons who are substantially limited in the major life activity of working. Under the court of appeals' reasoning, they contend, an employer would be entitled to withdraw the required accommodation as soon as it was provided, because the impairment would "no longer 'affect[ ] the individual in fact.'" Pet. Br. 33. There is no danger, however, that any court would adopt the absurd and circular rule that the provision of the ADA's remedy simultaneously removes the statute's protections.

The Tenth Circuit's rule does not suffer from such circularity. Petitioners are not disabled, not because they have received from an employer an accommodation without which they would be unable to perform a wide variety of jobs, but because they suffer from no functional impairment and could perform almost any job for which they were trained without accommodation.[21]

Petitioners also argue that the Tenth Circuit's reasoning is at odds with the second prong of the disability definition, which covers individuals with a "record of" being disabled. Pet. Br. 33-34. Petitioners contend that a formerly disabled but completely cured person is protected under the second prong, but that a person with an ongoing but controlled impairment would not be covered by the Act at all. *Ibid.* Every statute that draws a line around a protected class will cause some anomalies, but this is not one. The second prong of the disability definition aims at protecting individuals who were formerly disabled or inaccurately identified as disabled from discrimination based on the inaccurate belief that they are still disabled or the fear that the condition will recur. See 29 C.F.R. § 1630.2(k). It does not protect formerly disabled people from the sort of physical qualifications to which non-disabled people are subject. Thus, if a formerly blind person had his vision restored, but was still severely nearsighted, he would have no more right to challenge United's vision standard than petitioners do, because United's action would be based on his current, non-disabling vision impairment, not his former blindness.[22] In any event, ***petitioners*** would not be covered under the second prong even if their

[21] Nor is it true, as petitioners contend (Pet. Br. 33), that "the fact that an employee can perform a job only with a reasonable accommodation is itself a substantial limitation." Once again, petitioners disregard the fact that the threshold disability determination decides ***who*** is entitled to demand a reasonable accommodation from employers. The fact that an employee would need an accommodation to perform a ***particular*** job does not establish that he or she is substantially limited in the major life activity of working — just as an individual's use of corrective measures does not alone establish disability.

[22] Such a person might have a cause of action against United if, for example, United refused to hire him because of an unfounded fear that he would lose his vision again.

impairment were completely eliminated by laser surgery. The cure of an impairment that was never a disability does not make it one.[23]

B. The Legislative History Does Not Justify An Expansion Of The ADA To Require Disregard For Corrective Measures

Petitioners argue that they can discern from a few brief statements in committee reports that Congress intended to preclude consideration of any mitigating measures when determining whether an individual is covered by the Act. It is inappropriate, of course, to resort to the legislative history to divine the meaning of a statute when the statute itself is clear. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Even when a statute is ambiguous, moreover, the legislative history is of little value in clarifying congressional intent if it expresses inconsistent positions regarding the question at hand. With regard to the narrow question of mitigating measures, "[t]he legislative history [of the ADA] is more conflicting than the text is ambiguous." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49 (1950). Moreover, the legislative history (reinforcing the broad statements of purpose in the statute itself) makes it plain that Congress did not intend to protect under the ADA people like petitioners who have widely shared and easily remedied impairments. Accordingly, the legislative history may not

[23] The Government's argument from the structure of the ADA is more nuanced, but equally flawed. The Government contends that mitigating measures must be treated as parallel to reasonable accommodations, which come into play only after the disability determination has been made. See 97-1992 Gov't Br. 13. But it proves its own argument wrong when it observes (*ibid.*) that "[m]itigating measures taken by an employee will often require some accommodation by an employer." As this demonstrates, the effects of mitigating measures (both beneficial and limiting) are "inextricably intertwined," not with accommodations as the Government suggests, but with the impairment that (together with the mitigating measure) either does or does not constitute a disability that must be accommodated.

The Government says it is concerned about employers denying non-disabled employees the right to take medication. *Id.* at 14. But anyone whose medication schedule was so demanding that it could not be accomplished during normal breaks would no doubt be deemed to have a substantially limiting impairment, and hence remain entitled to the necessary accommodation.

fairly be used as a basis for extending the ADA to cover the more than 100 million Americans with correctable nearsightedness.

Petitioners claim that statements in three committee reports clearly convey Congress's intent that the existence of a disability be analyzed without mitigating measures (Pet. Br. 22), but those sources are far more ambiguous than petitioners suggest. Petitioners claim (*ibid.*) that a statement in the August 1989 report of the Senate Committee on Labor and Human Resources unambiguously supports their position, but it does the opposite. The report states that, under the first prong of the disability definition, "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, ***such as reasonable accommodations or auxiliary aids***." S. Rep. No. 101-116, 101st Cong., 1st Sess., at 23 (emphasis added). The statute itself makes plain that "reasonable accommodations" and "auxiliary aids" are devices or job modifications ***provided by the employer*** to permit a disabled individual to perform the essential functions of a job. 42 U.S.C. §§ 12102(1), 12111(9). Thus, the report's statement reflects the intention to avoid the circularity that petitioners and their *amici* apparently fear — *i.e.*, that the provision of an accommodation to an employee would simultaneously deprive the employee of the ADA protection by removing his or her substantial limitation in working. The statement does not convey any intention to protect under the ADA those ***who do not need accommodations or auxiliary aids*** because their impairments are completely controlled with medication or other corrective measures.

Another passage in the same report plainly conveys that the effects of medication or other corrective devices have a bearing on the question of disability. In describing the purpose of the "regarded as" prong of the disability definition, the Senate Report states:

> Another important goal of the [regarded as] prong of the definition is to ensure that persons with medical conditions ***that are under control, and that therefore do not currently limit major life activities,*** are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S. Rep. No. 101-116, at 24 (emphasis added). It could not be more clear that the drafter believed that persons "with medical conditions that are under control, and that therefore do not currently limit major life activities," would not be deemed to have a disability under the first prong of the definition.

Even the statements in the committee reports that do bolster petitioners' view that mitigating measures should be disregarded do not unambiguously support the application of such a rule to their own case. Those reports use as examples of "mitigated" impairments epilepsy or diabetes controlled with medication and hearing loss controlled with a hearing aid (H.R. Rep. No. 101-485(II), at 52; H.R. Rep. No. 101-485 (III), at 28-29) — impairments that are far more serious than petitioners' correctable nearsightedness.[24]

Finally, the legislative history is replete with evidence that Congress believed it was passing a statute that would protect the large, but limited, population of individuals with actual functional deficits, as opposed to those with purely hypothetical limitations. See, *e.g.*, H.R. Rep. No. 101-485(II), at 41-47 (describing effects of discrimination against the disabled). That evidence is perhaps strongest in the case of visual impairments; as discussed above (at 20-21), congressional estimates of the number of disabled individuals in America included only those who had a significant vision deficits even when using corrective lenses. Statements in committee reports to the effect that "two-thirds of all disabled Americans between the age of 16 and 64 are not working at all," that "men with disabilities earned 23 percent less than men with no work disability," and that "forty percent of all adults with disabilities did not finish high school" (H. Rep. No. 101-485(II), at 32) also contradict any notion that Congress intended to protect nearsighted persons, who have higher than average income and education.

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[24] Notwithstanding petitioners' comparison of their own situation to that of a person with hearing loss (Pet. Br. 22-23), in common perception hearing impairments requiring the use of a hearing aid are far more serious than the more common and easily remedied nearsightedness or farsightedness. See *Washington* v. *HCA Health Servs.*, 152 F.3d at 470 (expressing doubt concerning whether correctable visions impairments are sufficiently similar to the "serious" impairments, such as hearing impairments, enumerated in EEOC guidance to be evaluated without regard to mitigating measures). In any event, we doubt that the committee reports are sufficiently powerful legislative history to require application of the ADA to a person who wears a hearing aid but who with that aid is ***not*** substantially limited in any actual major life activity and not even "regarded as" being so limited.

More important, as discussed above, the statutory findings themselves — which, unlike the committee reports, were likely considered by every legislator and the President — convey the congressional purpose to protect those with serious impairments who were faced with discrimination, isolation, and underemployment, not people who can function perfectly well merely by taking a few pills or putting on their glasses. As Justice Scalia has observed,

> it is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis * * * in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. *Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also *City of Chicago* v. *EDF*, 511 U.S. 328, 337 (1994). That observation is especially pertinent to a case such as this, in which petitioners propose, based on "a few snippets" of analysis unmoored in statutory language, to expand the ADA to include perhaps more than 100 million additional potential plaintiffs.[25]

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[25] Petitioners also contend that Congress ratified in the ADA a consistent judicial construction of the Rehabilitation Act's definition of "handicap" that disregarded corrective measures. That argument has many flaws. First, the weight of pre-ADA case law supported consideration of mitigating measures. See, *e.g.*, *Reynolds* v. *Brock*, 815 F.2d 571 (9th Cir. 1987) (plaintiff's controlled epilepsy substantially limited her ability to work). See generally 97-1992 Resp. Br. Second, even if petitioners' reading of the pre-ADA cases were correct, it would not be reasonable to infer from Congress's adoption of the Rehabilitation Act's definition of disability that it was aware of this nuance of interpretation. See *Hirschey* v. *FERC*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring) (rejecting notion that committee report reflected intent of Congress to resolve "a difficult question of interpretation that had produced a conflict in the circuits and internal disagreement within three of the five courts that had considered it [by] reenactment of the same language unchanged!") (emphasis omitted). Third, even the most diligent legislator inquiring into the Rehabilitation Act's treatment of nearsightedness would have been surprised to hear that it supposedly supported coverage for more than 100 million nearsighted Americans. No Rehabilitation Act case had ***ever*** protected a nearsighted person on this theory, and some cases had reached a contrary result (*e.g.*, *Padilla* v. *City of Topeka*, 708 P.2d at 550).

C. At The Very Least, The ADA Should Be Read To Exclude Individuals With Widely Shared And Easily Correctable Impairments

Even if the Court defers to the EEOC's views that the disability analysis should disregard mitigating measures, it should affirm the Tenth Circuit's ruling that petitioners are not disabled. As Judge Wilkinson observed for the Fourth Circuit concerning the Rehabilitation Act, "it would debase [the] high purpose [of the statute] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared." *Forrisi* v. *Bowen*, 794 F.2d 931, 934 (1986); see also *Shiflett* v. *GE Fanuc Automation Corp.*, 960 F. Supp. 1022, 1029 (W.D. Va. 1997) ("Those who insist that any common human flaw rises to the level of disability, to the extent they are successful, dilute the strength of the ADA and rob truly disabled individuals of ADA protection."), aff'd, 151 F.3d 1030 (4th Cir. 1998). To avoid expanding the ADA well beyond its intended bounds, the Court should rule that common impairments that are completely correctable by easily used mitigating measures are not disabilities.

Petitioners and their *amici* spend little time discussing the facts of this case, as we noted above. They pin their hopes on the argument that there is no principled way to distinguish their case from those of others with correctable impairments who appear far more worthy of inclusion. Pet. Br. 36-38; Gov't Br. 10. But that is decidedly weak justification for throwing open the floodgates and permitting more than 100 million people whom Congress obviously meant to exclude to claim coverage under the Act. To give primacy to the achievement of some formulaic consistency (which notably is ***not*** rooted in the text of the statute) is particularly misguided in the context of a statute that presumes a case-by-case determination of what constitutes substantial limitation.

As we have argued, neither the text nor the legislative history of the Act provides an inkling that it covers people with correctable nearsightedness and others who experience no disadvantages from their easily mitigated impairments. The purposes of the statute, moreover, are not served by providing such persons a right of

action to challenge the physical qualification standards or other actions of their employers. Even the EEOC guidance on which petitioners and their *amici* principally rely does not expressly bless the inclusion of such persons under the Act. As the Fifth Circuit recognized in *Washington* v. *HCA Health Services*, the EEOC guidelines require only that "serious impairments and ailments" such as diabetes, epilepsy, and hearing impairments be considered in their unmitigated state. 152 F.3d at 470.

Even when mitigating measures are considered, the protected class of those who are "substantially limited" by their impairments properly includes those whose control of their significant impairment is meaningfully incomplete or requires resort to corrective measures that themselves have debilitating effects or impose non-trivial restrictions. See *Cehrs*, 155 F.3d at 781. "[W]hat is necessary to 'control' the condition may be part of what makes the person disabled." *Gilday*, 124 F.3d at 768 (Guy, J., concurring in part and dissenting in part). If, however, the Court is concerned that describing the group to be ***included*** within the protected class with reference to mitigating measures will result in unduly restrictive rulings, it may instead draw a line around those who should be ***excluded*** from the class — people whose easily correctable impairments consistently and reliably leave them with abilities on a par with average working people, and for whom the corrective measures themselves impose no significant burden. Petitioners are inside that line.

III. AN INDIVIDUAL REJECTED FROM A PARTICULAR JOB FOR FAILURE TO MEET PHYSICAL STANDARDS IS NOT NECESSARILY "REGARDED AS DISABLED" BY THE EMPLOYER

Petitioners also claim that they are entitled to relief under the third prong of the ADA's disability definition, which extends statutory protections to person who are "regarded as" having a disabling impairment. Although petitioners and their *amici* repeatedly invoke Congress's concern about the "myths, fears, and stereotypes associated with disabilities" (see, *e.g.*, Harkin Br. 21), their argument boils down to the contention that an employer by definition regards an employee as disabled whenever it deems the employee physically unfit for a particular job.[26] If that reading of

[26] Certain of petitioners' *amici* argue expressly for that interpretation.

the "regarded as" prong were correct, however, then ***any*** employment action made on the basis of ***any*** impairment, no matter how minor, would have to pass muster under the ADA — a result that would expand the ADA well beyond its intended limits. This Court should approve the uniform rulings of the lower courts rejecting such an overbroad reading of the statute.

The ADA's definition of disability includes not only having an "impairment that substantially limits one or more of the major life activities" (42 U.S.C. § 12101(2)(A)), but also "being regarded as having such an impairment" (*id.* § 12101(2)(C)). The third prong's phrase "such an impairment" incorporates the first prong's language. Accordingly, to qualify as "disabled" under the third prong, an individual must be "regarded as having an impairment that substantially limits a major life activity."

Petitioners claim that United regarded them as substantially limited in the major life activity of working.[27] The EEOC's regulations define "significantly restricted in the major life activity of working" as:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). According to the regulations, a "class" of jobs is "jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area." *Id.* § 1630.2(j)(3)(ii)(B). Using an example especially pertinent here, the EEOC's interpretive guidance states that "an individual who cannot be a

See ACLU Br. 21 ("any employer who takes an adverse employment action against a person *because of* a physical or mental impairment necessarily regards that person as substantially limited in the life activity of working and hence as a person with a disability").

[27] Because petitioners here focus only on the allegation that United regarded them as substantially limited in working (Pet. Br. 42 n.38), we address only that allegation. For the same reasons that petitioners are not actually limited in the major life activity of seeing, however, United did not regard them as such.

commercial airline pilot because of a minor vision deficiency, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. § 1630, App. § 1630.2(j) para. 15.

"For the same reason that the failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped person." *Tudyman* v. *United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984). Thus, when an employer decides that a person's impairment renders him unfit for a job with unusual physical requirements, the disappointed employee cannot claim that the employer regarded him as disabled in the major life activity of working. See, *e.g.*, *Deas*, 152 F.3d at 481-482 (plaintiff was not "regarded as" disabled by employer who fired her from a substance abuse clinic because of her seizure disorder; "there is simply no indication that [the employer] regarded [plaintiff] as substantially limited as to anything more than a few, highly specialized jobs, that required relatively high levels of vigilance or uninterrupted awareness"); *Bridges* v. *City of Bossier*, 92 F.3d 329, 335 (5th Cir. 1996) (plaintiff rejected because of mild hemophilia from firefighter job was not "regarded as disabled" because the perceived limitation "only affects a narrow range of job"), cert. denied, 519 U.S. 1093 (1997); *Chandler*, 2 F.3d at 1392 & n.20 (vision impairment that caused the plaintiff's rejection as a police officer affected only a narrow range of jobs, even though the defendant alone employed 27,000 police officers). By contrast, when an employer views the employee as having an impairment that would limit him or her in a broad range of jobs, there may be a litigable issue as to whether the employer regards the employee as disabled. See *Cook* v. *Rhode Island*, 10 F.3d 17, 26 (1st Cir. 1993) (employer's belief that obese woman was physically unsuited for job which required "no unique physical skills" amounted to "a perception that the applicant suffers from physical limitations that would keep her from qualifying for a broad category of jobs").

Thus, "there is a significant legal distinction between rejection based on a job-specific perception that the applicant is unable to ***excel*** at a narrow trade and a rejection based on more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs." *Cook*, 10 F.3d at 26 (emphasis added). United's rejection of petitioners falls into the former category. Petitioners and their supporting *amici* seek to raise doubt

about the proper characterization of United's beliefs concerning their impairment, but even the broadest conceivable characterization of United's perceptions does not amount to a belief that petitioners were substantially limited in the major life activity of working.

In their complaint, petitioners claimed that United's policy requiring new pilots to have uncorrected visual acuity of 20/100 "blocks Plaintiffs from an entire class of employment: ***global airline pilot***." J.A. 25 (emphasis added). They also alleged that "other global carriers had similar or higher minimum standards, thus blocking Plaintiffs from seeking ***the same class of employment*** elsewhere in the industry." J.A. 26 (emphasis added). The court of appeals held those allegations insufficient to establish that United regarded petitioners as disabled, ruling that the path that they said was closed to them, "global airline pilots," was "too narrow to constitute a 'class of jobs.'" J.A. 71. The court said (J.A. 71-72):

> [T]he class of jobs to which [petitioners] must compare themselves is that of all pilot positions at all airlines, because they all require the same or similar training, knowledge, skills, or training abilities. This class would include, but not be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines.[28]

Petitioners now seek to rewrite their complaint by arguing that United perceived them as unfit for ***any*** pilot job. The Government joins them in that effort, claiming (without citing any language in the complaint) that "[p]etitioners allege that respondent regards petitioners as unqualified for any pilot position, because respondent believes they cannot safely fly an airplane." Gov't Br. 16. These arguments raise an interesting philosophical question: Does United's decision to adopt higher vision standards than the FAA or many non-global carriers in an effort to make its planes "safer than safe" mean that United "believes [petitioners] cannot safely fly [any] airplane"? More important, does United's alleged decision to

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[28] The court of appeals was generous to petitioners in assuming that only pilot positions bore on the "regarded as" issue. One who cannot be a pilot because of, for example, fear of flying is not limited in the major life activity of working, or regarded as such. He is regarded as unqualified, which is quite different from being regarded as disabled. See p. 49, *infra*.

take advantage of the fierce competition for its pilot positions by demanding that its pilot applicants meet the highest physical standards mean that it regards applicants whom it rejects (who it knows are capable of obtaining employment at other air carriers) as substantially limited in the major life activity of working? We think not. In the words of the *Cook* court, United seeks (and pays for) pilots who "excel" on this safety-related criterion as well as in other respects.

The major leagues' last .400 hitter, Ted Williams, was famous for his 20/10 eyesight. See *In Every Sense, Williams Saw More Than Most*, USA Today Baseball Weekly, June 6, 1996 <http://www.usatoday.com/sports/baseball/sbbw0725.htm>. Were the Boston Red Sox to take their left fielder with 20/20 vision out of the lineup and replace him with a prospect who had 20/10 vision and aspirations of being a modern-day Ted Williams, it would hardly follow that the Bosox regarded the replaced left fielder as "disabled." Just as a baseball team tries to field the ***best*** lineup and not just a good lineup, so United may sometimes go beyond minimum requirements in an effort to provide the public with ***the safest*** air transportation, not just "safe" air transportation. The judgments about how to achieve those results may not be ineluctable or perfect, and someone can always second-guess any categorical judgment, but that is no reason to expand the reach of a statute designed to require employers to justify their judgments ***about persons with disabilities***. Attempting to go beyond minimum safety requirements should not preclude United from obtaining Rule 12(b)(6) dismissals of complaints brought by persons who are not disabled.[29]

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[29] That is especially so in light of a recent trend in this Court's cases allowing state common law to impose higher standards of care on defendants in tort suits, even if the defendant can prove compliance with a federal statute with an express preemption clause. See generally *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). Were a United plane with a myopic pilot to crash, one could count on the filing of lawsuits against United on the theory that it had a duty of care to hire only pilots with vision better than that of the pilot of the crashed plane, and that it makes no difference that the Federal Aviation Administration has recently begun to allow anyone with 20/20 ***corrected*** vision to be a pilot. Cf. *Daugherty* v. *City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) ("'Woe unto the employer who put such an employee behind the wheel of a vehicle * * * which was involved in a vehicular accident.'") (quoting *Chandler*, 2 F.3d at 1395).

Even if an employment rule screens out only a small segment of the population, it does not follow that the rule reflects, or even might reflect, any view on the employer's part that the screened-out persons are "disabled." A supermarket that will not hire as shelf stockers anyone shorter than five feet tall in no way implies that it considers short people "disabled." So too here, United makes some allowance for the common condition of nearsightedness but screens out a substantial minority of the most myopic. Had United followed the Navy's example and required near-perfect uncorrected vision, it would be hard to take seriously the notion that its stringent rule reflected a view that everyone not meeting that standard is "disabled." It would be ironic if United's decision to make some allowances for nearsighted pilots bolstered the chances of a lawsuit brought by those who cannot meet even its relatively lenient standard.

The ultimate question here can be answered in a more straightforward fashion, however. Even if petitioners' complaint could be construed as alleging that United perceived petitioners as physically unfit to fly any commercial airplane, those allegations would not establish that United regarded them as substantially limited in the major life activity of working because the position of "pilot" is far too specific to constitute a "class of jobs" the foreclosure from which would render an individual disabled. See *Witter* v. *Delta Air Lines*, 138 F.3d 1366, 1370 (11th Cir. 1998) ("[e]ven accepting as true that Delta perceived Witter as unable to pilot airplanes because of mental or emotional problems, we conclude that piloting airplanes is too narrow a range of jobs to constitute a 'class of jobs'"). There are many non-piloting jobs that use "similar training, knowledge, skills and abilities" as pilot positions, including

> pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

Ibid.; see also *Burbank* v. *City of Idaho Falls*, 1996 U.S. App. LEXIS 24127 (9th Cir. Sept. 11, 1996) (defendant who viewed plaintiff with impaired vision as unfit for the positions of patrol police officer, professional pilot, and lab technician did not regard him as disabled). There is no allegation that petitioners would be physically unqualified for such jobs, or that United treated them as though it believed they would be.

Thus, the court of appeals' dismissal of petitioners' claim that United discriminated against them because it regarded them as disabled was proper under the widely accepted rules and doctrines by which courts have consistently evaluated such claims. It also accords with the intent of Congress to protect under the third prong of the definition those persons with impairments who might be denied the opportunity to work because of fear, prejudice, and misunderstanding of their condition. See *Arline*, 480 U.S. at 284 (by enacting third clause of disability definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that can flow from actual impairment"). There can be no serious argument that petitioners were subject to fear or prejudice because of their nearsightedness; they were affected instead by United's calculation that hiring pilots who could see well enough to fly an airplane without corrective lenses would give its passengers an additional margin of safety. The ADA does not give petitioners the right to litigate the correctness of United's decision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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